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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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JOHN C. GETZ ET AL,
PETITIONERS,

v.

TOWN OF BELLEAIR,
A Municipal Corporation,
RESPONDENT.

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## BRIEF OF RESPONDENT, TOWN OF BELLEAIR, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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John C. Getz and others seek a review by certiorari of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit handed down June 2, 1941 (*John C. Getz et al., appellants, v. Town of Belleair, appellee*, 120 F. (2) 494, reported in Advance Sheet of July 21, 1941), reversing a judgment of the United States District Court for the Southern District of Florida.

## A CONCISE STATEMENT OF THE CASE

The "Statement of the Case" (pp. 2 *et seq.* of the petition) is sufficiently accurate and full. We, therefore, adopt said statement of facts, but we do not

concur in various legal conclusions and implications contained in said statement.

## ARGUMENT

We perceive no ground upon which this Court should grant certiorari. As we see them, the petition and brief are bad in form and in substance. The petition is chiefly a legal argument, not indexed, and we do not find any prayer therein for writ of certiorari, although the title suggests that purpose, and the brief is a meager supplement to the petition; no serious effort to observe the requirements of the rule seems to have been made in either.

Passing matters of form, however, we find substance fatally lacking. Two points (in reality the same) are stated and relied upon by petitioners. Under Point I they argue that the Florida court had construed the bond validating statute (Appendix "A" of petitioners' brief) to mean that bonds so validated could never be held void on any ground, and that the bonds in question were issued and sold under that state of the law and, therefore, the Florida Supreme Court could not invalidate the bonds by holding as it did in *Olds v. Alvord* that, since the Town of Belleair had no power to issue bonds, the bonds were void *ab initio,* that the validating statute had no application, and that the decree of the Circuit Court, under said statute, purporting to validate said bonds could not and did not breathe life into them. Under Point II they argue that the purchase of the bonds upon the faith of the validating decree of 1924 created a vested right which the State court could af-

fect, if at all, only by vacating the validating decree, which has not been done.

Petitioners lean heavily upon the case of

> *Gelpecke v. City of Dubuque,*
> 68 U.S. 175, 17 L.Ed. 520,

which holds that

> "If the contract when made was valid by the laws of the State as then expounded and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent legislation or decision of its courts,"

and argue that this rule is not affected by *Erie Railroad v. Tompkins.* It is quite unnecessary to determine what, if any, effect the latter case has upon the former; the facts in the instant case do not come within the rule of the Gelpecke case.

The same is true of the case of

> *Columbia County v. King,*
> 13 Fla., 451.

There Columbia County had issued bonds in aid of a railroad under a statute which the Supreme Court had held to be constitutional. Later the Florida court held the statute to be unconstitutional. The case simply decided that a change of decision by the Florida court after the bonds were issued and sold did not affect their validity. No such situation appears in the instant case.

Various answers to petitioners' argument may be briefly stated as follows:

1. At the time the bonds in question were issued, validated, and sold — namely, in July, 1924 — there had been no decision of the Supreme Court of Florida construing the validating statute to have any such meaning as opposing counsel contends (nor, with apologies to him, has there been any such construction at any time); on the contrary, the earliest of the various cases cited and relied on by counsel (p. 13 of the petition) is that of *Thompson v. Frostproof,* which was decided in February, 1925.

2. None of the cases cited by counsel holds that bonds issued by a municipality *which was not empowered by law to issue bonds* could be validated under the validating statute. *Olds v. Alvord* was the first case involving that question. The Court had, however, declared many qualifications and limitations upon the application of the statute:

Such a decree does not

> ". . . cure a patent violation of a command or prohibition of the Constitution."
>
> *Weinberger v. Board of Public Instruction,* 93 Fla. 470, 112 So. 253.
>
> *State v. Hillsborough County,* 113 Fla. 345, 151 So. 712.
>
> *State v. Crandon et al.,* 115 Fla. 153, 155 So. 667.

Such a decree does not adjudicate but rather presupposes the existence of a bonding unit.

> *Municipal Bond & Mortgage Corp. v. Bishop's Harbor Drainage Dist.*, 133 Fla. 430, 182 So. 794.

In this case it was held that bonds of a drainage district which did not legally exist were not made valid by a validating decree.

Questions not necessarily involved or put in issue in the validating proceedings are not concluded thereby.

> *Sparks, Mayor, et al., v. Ewing, et al.,*
> 120 Fla. 520, 163 So. 112.
>
> *State v. Town of Belleair,*
> 125 Fla. 669, 170 So. 434.

The question whether certain lands embraced within a municipality are so rural that they cannot constitutionally be subjected to taxation for municipal purposes is not foreclosed by a validating decree.

> *City of Winter Haven v. A. M. Klemm & Son,*
> 132 Fla. 334, 181 So. 153.
>
> *State v. City of Pompano,*
> 113 Fla. 246, 151 So. 485.
>
> *State v. City of Coral Gables,*
> 114 Fla. 326, 154 So. 234.

Where disconnected tracts of land were attempted to be incorporated by the inhabitants under the gen-

eral law of Florida and bonds were issued and judicially validated, the taxable liability of the separated tracts to pay the bonds, or whether such lands were *de jure* or *de facto* a part of the municipality, was held by this Court not to be foreclosed in

> *Ocean Beach Heights v. Brown-Crummer Inv. Co.*, 302 U.S. 614, 58 S. Ct. 385, 82 L.Ed. 380.

and that decision was cited and approved by the Florida court in the Klemm and Pompano cases, *supra*.

It is, therefore, apparent that *Olds v. Alvord* did not change any opinion previously rendered but decided a point not theretofore passed upon by the Florida court.

3. *Olds v. Alvord* holds in effect that the Circuit Court was without jurisdiction to validate municipal bonds *where the municipality was not empowered by law to issue bonds*; hence the decree of validation was a nullity and subject to collateral attack. Lacking jurisdiction of the subject-matter, jurisdiction of the parties—citizens and taxpayers—was not obtained by the constructive service (publication) provided for in the statute.

4. Absent the decree and judgment role in the suit to validate the bonds, this Court cannot determine that the decree in that case has the effect contended for by petitioners, even if the underlying basis of petitioners' contention were sound.

5. Petitioners were parties as members of a class to the action in the State court (*Olds v. Alvord*), and

for that reason are bound by the judgment rendered in that case. If that judgment was erroneous the remedy was by certiorari therein to this Court. If petitioners were not parties the Federal Court was nevertheless bound to hold the bonds to be void, because the State court had so held as to the Olds bonds, which were identical, and the Federal Court was bound to follow the State court. Therefore, whether the Circuit Court of Appeals acted under the rule of *res judicata* or *stare decisis,* the same result was reached. However, the record discloses that petitioners were made parties under the class-suit rule and are, therefore, as much bound by the decree in that case as if they had been named and brought into court by personal service.

## Class-Suits Statute and Proceedings In State Court Examined

Reviewing briefly the Florida statute and proceedings, we find that Section 14 of the 1931 Chancery Act of Florida is the same as Federal Equity Rule 38, which was superseded by the Rules of Civil Procedure, and reads as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

In the suit in the State court by taxpayers of the town of Belleair to enjoin the collection of taxes theretofore levied and the further levy and collection of

taxes to pay the bonds in question, it was alleged that, in addition to the holders of bonds named as defendants therein, there were many others whose names were unknown to the plaintiffs, and

> ". . . that it is impracticable to bring all bondholders before the Court, and this action is, therefore, brought against said named bondholders personally and as representatives of a class, to-wit, the class of holders of said bonds to which they belong. Plaintiffs further aver that the other bondholders, whoever they may be, have a common and general interest with the said named bondholders in the subject matter of this action" (R. 71).

Olds and Newberry, two of the named bondholders, appeared and vigorously contested through the Circuit and Supreme Courts of Florida. In their answer, they aver that they

> *". . . own bonds or coupons of the Town of Belleair of all of the issues which are attacked in the bill of complaint"* (R. 100),

and then they say that the plaintiffs have more knowledge than they claim of the ownership of the bonds, and put in issue the good faith of suing said bondowners as a class (R. 100-101). The final decree of the State circuit court, paragraph 3 (R. 43), says:

> "It appears from the record in said cause that the holders of the bonds herein referred to and herein named constitute a class in the aggregate so numerous as to make it impracticable to bring them all before the Court, and

> the bill was, therefore, properly brought against the bondholders herein named personally and as representatives of a class, to-wit: The class of holders of the issues of bonds described in the bill of complaint and hereafter described; that all such bondholders have a common and general interest in the subject matter of this action, including the parties defendant now before the Court, to-wit: R. E. Olds and Truman H. Newberry, who are fairly representative of all the interests of said classes of bondholders, have an interest in the relief sought, and have actively and aggressively defended the same."

This finding of the Circuit Court was not questioned in the appellate proceedings, and the Supreme Court of Florida treated and dealt with the proceedings as a class suit. *Olds et al. v. Alvord,* 136 Fla. 549, 188 So. 652. Moreover, the District Court in this proceeding specifically found that:

> "The said proceeding in the State Court against the plaintiffs herein as members of a class was regularly conducted according to the law of Florida," etc. (R. 148).

Hence it is that the regularity of the proceedings in the State court as a class suit against the bondholders affirmatively appears from the record, and was specifically found by the trial court.

### Class Suits Are Valid and Effective

The recent case of

*Hansberry et al. v. Lee et al.,*
61 S. Ct. 115 (Advance Sheet of Dec. 1, 1940),

definitely holds, in accordance with previous decisions, that:

> "Where the interests of persons not joined as parties are of the same class as the interests of those who are joined and where it is considered that the former fairly represent the latter in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree" (Headnote 7),

and that:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws subject only to the requirements of the federal constitution" (Headnote 1).

The Supreme Court of Florida has also upheld class-suit actions under the Florida statute.

> *Meier v. Johnston,*
> 110 Fla. 374, 149 So. 185.

In other words, class suits properly conducted under valid state laws in proper cases are binding upon the absent members of the class. On the other hand, if the absent parties do not sustain such relation to the matter in controversy as to place them in the class with the named and litigating parties, the decree is not binding upon the absent parties.

It follows, under the rule announced in *Hansberry et al. v. Lee, supra,* which cites and discusses prior

decisions on the subject, that if the necessary class relationship to the subject-matter litigated in the State court appears as between Olds, the defending member, and Getz, the class member, Getz has had his day in court, the requirements of due process have been satisfied, and the Federal Court cannot afford Getz any relief which would be contrary to the decision of the State court.

### Olds and Getz in Same Class

It is true that each bond issued by a municipality is, in a sense, a separate contract, but it is also true that all the bonds in this case were issued as general obligations of the Town, and must of necessity be paid, if at all, by general taxation. Hence it was that whether a tax could be levied to pay the bonds was a matter of common and identical interest to all bondholders.

The distinction between an action upon individual bonds and an attack upon the power to levy a tax to pay any bonds of a given issue because of an infirmity common to all is recognized in

> *Brown v. Trousdale,*
> 138 U.S. 389, 34 L.Ed. 987,

The taxpayers' suit in that case, unlike the suit in the instant case, prayed that the

> ". . . bonds be declared invalid, and all holders thereof be perpetually enjoined from collecting the principal and the interest thereon"

(obvious relief *in personam,* which could only be granted upon personal service), while in the instant case the prayer was:

> "That no tax shall be levied or collected to pay the interest on said bonds or the principal thereof, or the interest upon or principal of any of said bonds";

and that the Town and its officers be permanently enjoined from levying or collecting any general tax

> ". . . for the purpose of paying the interest or the principal, or any part thereof *evidenced by said bonds, or any of them"* (R. 96).

(obviously not requiring a personal decree against bondholders, but only, as to them, determining whether the property in the Town was subject to be taxed to pay their bonds). But the cases are analogous in the respect pointed out by the Court in that opinion that, since

> "The plaintiffs were not prosecuting an action against individual bondholders for the cancellation of individual bonds," but ". . . were attacking the validity of the entire subscription and seeking a decree which would invalidate the entire issue," the ". . . cause of action was not susceptible of division,"

and, therefore, not removable by the non-resident bondholders. It seems evident, therefore, that some bondholders could defend for all in the Belleair case.

This Court, in the Hansberry case, makes several statements which greatly aid in the application of the class-suit principle. The Court says:

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."

To support the first statement of the above quotation, the opinion cites

> *Smith v. Swormstedt,*
> 16 How. 288, 14 L.Ed. 942;
>
> *Supreme Tribe of Ben-Hur v. Cauble,*
> 255 U.S. 356, 41 S. Ct. 338;
>
> *Groves v. Farmers State Bank,*
> 368 Ill. 35, 12 N.E. (2) 618.

It seems too clear to justify amplification that the holders of all general-obligation bonds of the town of Belleair (especially bonds of the same issue and date)

had *"a common right"* and a common interest in the question whether a tax could and should be levied to pay said bonds, and that the interests' representative who appeared and defended was necessarily "the same as those whom they are deemed to represent." In other words, that the interests of Olds and Newberry as bondholders, touching the question of whether a tax could and should be levied to pay the bonds, were identical with the interest of Getz as holder of bonds of the same issue. This Court, however, has prescribed very definite and clear rules to determine the application of class actions in Civil Procedure Rule 23, which says:

> "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> "(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> "(2) several, and the object of the actions is the adjudication of claims which do or may affect specific property involved in the action; or
>
> "(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

It is confidently urged that the case at bar falls definitely within items (2) and (3) of the above quoted

rule. While the bondholders own bonds severally, there was litigated in the State court the "common question of law or fact affecting the several rights" whether a tax could be levied to pay the bonds, and "a common relief" was "sought" — namely, that the Town and its taxing officials be perpetually enjoined from levying a tax to pay the bonds. Moreover, specific property was involved in the action— the property in the Town and its taxable status for the purpose of paying said bonds. The taxable status of given property within the jurisdiction of the court is a thing upon which the court can act, just as the marriage status can be acted upon in the domiciliary jurisdiction of either spouse. It would be difficult to imagine, we submit, a case falling more clearly within said Civil Procedure Rule 23 than the instant case.

In a suit to enjoin the levy of a tax to pay bonds, the bondholders should be made parties.

> *State et al. v. Hillsborough County,*
> 113 Fla. 345, 151 So. 712.
>
> *Denver Land Co. v. Moffat Tunnel Imp. Co.,*
> 284 Pac. 339, and authorities there cited.

It is worthy of note that this Court in *Hansberry v. Lee, supra,* said that the Fourteenth Amendment does not require the State courts or Legislatures to adopt any particular form or rule for establishing the conclusiveness of judgments in class suits or the adoption of the particular rule thought by that court to be appropriate for the federal courts. In short, the court makes it plain that, within the limits of due process, the states are at liberty to say what may

be the subject of class suits, how such suits may be prosecuted, and when they are effective to bind class parties.

It has been pointed out already that the defendant bondholders who contested the State court taxpayers' suit for injunction contended, among other things, that the suit was not a proper class suit, that the contention was overruled by the trial court, and that the Supreme Court of Florida (in *Olds v. Alvord,* 188 So. 652) took cognizance of the fact that it was a class suit purporting to bind defendants not parties, and that finally the Supreme Court affirmed the trial court's decree as to the $300,000 issue (191 So. 441), part of which bonds are here involved.

Thus, under the Florida law, it seems quite plain that a taxpayers' suit, where the bondholders are made parties, and where the facts are as they are here, is the proper subject for class suit. This being true, it would seem that all questions as to the propriety and procedure of the suit as a class suit were eliminated by the Florida court, and that, at most, there could only remain the narrow question whether the guaranty of due process forbids that the State court decree be treated as binding upon class defendants. All questions, save this, are of State law and appear to be settled.

It has not been asserted that to treat the State court decree as binding would deprive plaintiff of due process of law, and we understand that such questions must be raised upon the record before the lower court and ruled adversely before they would be considered

here. It seems obvious that such a contention, if it had been made, could not succeed. The object of the taxpayers' suit was to secure an adjudication that the lands of the taxpayers should not be taxed to pay the bonds, for the reason that they were void. The object of the answer filed by two of the named defendant bondholders was to defend against the objectives of the taxpayers and obtain a decree that their lands should be taxed to pay the bonds in question. The asserted right, on the one hand, to have the taxing power stayed, and the asserted right, on the other, to have it exercised, constituted the *res,* the property, or property right upon which the suit was to operate. This question was vigorously litigated as demonstrated by the number of opinions written by the Supreme Court. If the ones who defended had prevailed, so would have the whole class. The common interest of all bondholders involved was that the Court should hold that taxes could be levied and collected to pay the bonds, some of which were held by the active defendants, others by members of the class. The fact that the right or asserted right involved related to whether lands within the municipality could or could not be taxed to pay the bonds, instead of to a fund or a trust, is only different in degree. Common interest on both sides pervades the whole question. To grant the efficacy of class suits in the cases illustrated in Rule 23 is to establish the efficacy of the decree here involved to bind Getz.

Furthermore, the proceeding in the State court was, as we have shown, *quasi in rem.* The bondholders could not be enjoined from bringing suit to collect their bonds, because that would be a decree *in per-*

*sonam,* and such a decree could only have been entered against such bondholders as could be personally served, but the taxable status of the lands and other property in the Town could be determined in a suit against the Town and its taxing officials, in which the bondholders had the right to be heard because of their interests in the subject-matter involved; hence they were made parties. So far as the properties had been theretofore assessed and were subject to asserted tax liens, the bill of complaint was in the nature of a bill to quiet title or to remove a cloud from title. The bill alleges that the lands in the Town had been, and were continuing to be, assessed and taxes collected to pay the bonds, and that future assessments and attempted collections would continue unless enjoined. See paragraphs II and III of the bill of complaint (R. 73-74). Hence, we earnestly contend, in addition to the points heretofore made, that:

(1) The State court had jurisdiction to determine whether taxes theretofore assessed to pay the said bonds constituted a lien upon the lands involved, and that the decision of that question foreclosed the question of the right to make future assessments; and

(2) The taxable status of the lands for bond-service purposes was a thing upon which the Court acted and acquired jurisdiction to act.

Thus it becomes apparent that the application of the rule of *res judicata* or of *stare decisis* leads to the same ultimate result—namely, that the judgment of the State court must be followed by the Federal Court under the rule of

*Erie Railroad v. Tompkins,*
304 U.S. 64, 82 L.Ed. 1188.

The suggestion that the Erie Railroad case does not decide whether it is the duty of the Federal Court to follow the State law as declared by the most recent decision of the State court or some prior decision is an anomaly. Manifestly, a state cannot have at the same time directly opposing and contradictory laws, and the latest decision of a supreme court supersedes prior contrary decisions, but if any question on that point could otherwise be open it is foreclosed by the late case of

*Vandenbark v. Owens-Illinois Glass Co.,*
61 S. Ct. 347,

wherein this Court says:

> ". . . the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court."

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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